Kanawagi a/l Seperumaniam v Dato' Abdul Hamid bin Mohamad

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R2–25–96 OF 2002
FAIZA TAMBY CHIK J
27 MARCH 2003

Administrative Law — Judicial review — Application for — Participation and role of Attorney-General's Chambers and respondents — Rules of the High Court 1980 O 53

The applicant is an advocate and solicitor. The third respondent who was a former client of the applicant had lodged a complaint against the applicant to the Legal Profession Disciplinary Board ('DB'). The second respondent constituted an Investigating Tribunal ('IT') against the applicant. The applicant applied ex parte for leave to apply for judicial review to quash the decision of the DB in constituting an IT against him. At the hearing date, the Attorney-General's Chambers ('AG') and the first, second, fourth, fifth and sixth respondents opposed the application for leave.

Held, allowing the application with costs against the first, second, fourth, fifth and sixth respondents:

(1) When an applicant files an application for leave for a judicial review remedy, he has to serve all the papers on the AG. The rule is based on the principle that judicial review is a principal tool of 'public law' applicable to 'public' bodies. As public bodies impliedly attract public interest and the guardian of public interest is the AG, this rule makes the AG a nominal party in all judicial review applications (see paras 3–4).

(2) The intention of the rule is to ensure that the AG vets all judicial review applications in order to ascertain if his participation is warranted. Whether the AG elects to appear or not is solely at his discretion. If the AG does elect to appear, the court is bound to give a hearing. The court has no jurisdiction not to hear the AG. It is for the AG to show the public element involved in the application. The AG in electing to appear in a judicial review application must be cautious that his appearance is only in relation to matters of public interest (see paras 4 and 7).

(3) The applicant was complaining that the second respondent in exercising its statutory powers by constituting an IT against him has infringed his rights. The applicant was asking the court to quash the decision of the second respondent. There was no question of public element arising in the applicant's complaint. The wrong was purely a wrong done to the applicant in his personal capacity or in the capacity that only attracted private law (see para 8).

(4) It was an adversity to logic to say that the action of the DB in setting up an IT was not a decision that could be amenable to judicial review. There is no doubt that the action of the DB taken under s 100(1) of the Legal Profession Act 1976 was a decision which was susceptible to judicial review (see paras 17–18).

(5) The DB created under pt VII of the Legal Profession Act 1976 is a public body created to exercise discipline over the legal profession. Order 53 r 2(4) enables an aggrieved advocate and solicitor to seek redress from the court on the decision of the DB in setting up an IT (see para 20).

(6) It is clear from the wordings of O 53 r 3(1) and (2) that the application for leave is only ex parte which means that the respondent does not have a right of appearance. The proper procedure for the respondents would be for them to appear only when the court has granted ex parte leave to the applicant and that order extracted and served on them. It is the service of the ex parte order together with the cause papers on the respondents that makes the respondents parties to the proceedings (see paras 25, 27).

(7) Section 100 governs the power of the second respondent in constituting an IT whereas s 103 applies to the end stage of the disciplinary proceedings when the IT has made its findings to the DB and which then sets up a disciplinary committee. The requirement for the aggrieved party to appeal pursuant to s 103E is only confined to the decisions taken by the DB under s 103 and is independent from s 100. Applying the maxim *generalibus specilia derogant*, the requirement to appeal under s 103E does not apply to the remedy sought by a party aggrieved by a decision the DB made under s 100(1) and therefore giving the aggrieved party a right to seek judicial review (see para 36).

[**Bahasa Malaysia summary**

Pemohon merupakan seorang peguambela dan peguamcara. Responden ketiga yang merupakan bekas anak guam/klien pemohon telah membuat aduan terhadap pemohon kepada Lembaga Tatatertib Profesion Undang-undang ('LT'). Responden kedua menubuhkan sebuah Tribunal Siasatan ('TS') terhadap pemohon. Pemohon kemudiannya membuat permohonan ex parte untuk mendapatkan kebenaran untuk memohon suatu kajian semula kehakiman bagi membatalkan keputusan LT yang menubuhkan sebuah TS terhadap beliau itu. Pada hari pembicaraan, Jabatan Peguam Negara ('JPN') dan responden pertama, kedua, keempat, kelima dan keenam membangkang permohonan untuk mendapatkan kebenaran berkenaan.

Diputuskan, membenarkan permohonan dengan kos terhadap responden pertama, kedua, keempat, kelima dan keenam:

(1) Apabila seseorang pemohon memfailkan suatu permohonan untuk mendapatkan kebenaran bagi mendapatkan remedi kajian semula kehakiman, pemohon berkenaan mestilah menyampaikan semua kertas kepada PN. Kaedah ini berdasarkan prinsip kajian semula kehakiman yang merupakan suatu alat utama 'public law' yang terpakai kepada badan-badan 'public'. Oleh sebab badan-badan awam secara tersurat menggamit kepentingan awam dan PN merupakan penjaga/pelindung kepentingan awam, kaedah ini menjadikan PN sebagai suatu pihak pada nama/nominal dalam semua permohonan kajian semula kehakiman (lihat perenggan-perenggan 3–4).

(2) Kaedah berkenaan berhasrat memastikan supaya PN menyemak dan memeriksa semua permohonan untuk mendapatkan kajian semula kehakiman untuk melihat sama ada penglibatannya itu wajar atau tidak. Sama ada PN kemudiannya memilih untuk hadir atau tidak adalah suatu hal yang semata-mata terletak pada budi bicara beliau. Jika PN memilih untuk hadir, mahkamah terikat untuk mendengarnya. Mahkamah tidak mempunyai bidang kuasa untuk tidak mendengar PN. Menjadi tugas PN untuk memperlihatkan bahawa permohonan berkenaan membabitkan elemen awam. Dalam membuat pilihan sama ada untuk hadir dalam permohonan kajian semula kehakiman atau tidak, PN mestilah waspada bahawa kehadiran beliau itu hanya berkaitan dengan perkara-perkara yang membabitkan kepentingan awam sahaja (lihat perenggan-perenggan 4 dan 7).

(3) Pemohon mengadu bahawa dalam menjalankan kuasa-kuasa berkanunnya dengan menubuhkan sebuah TS terhadap beliau, responden kedua telah melanggar hak beliau. Pemohon meminta mahkamah supaya membatalkan keputusan responden kedua itu. Tidak timbul soal elemen awam dalam aduan pemohon. Yang salah hanyalah suatu kesalahan yang telah dilakukan kepada pemohon atas sifat dirinya atau atas sifat yang hanya menggamit undang-undang persendirian (lihat perenggan 8).

(4) Merupakan suatu kesusahan untuk menjadikannya logik untuk mengatakan bahawa tindakan LT menubuhkan sebuah TS bukan merupakan suatu keputusan yang mahu mengalah terhadap kajian semula kehakiman. Tidak diragui bahawa tindakan LT yang diambil di bawah s 100(1) Akta Profesion Undang-undang 1976 itu merupakan suatu keputusan yang boleh dikaji semula (lihat perenggan-perenggan 17–18).

(5) LT yang diwujudkan di bawah Bahagian VII Akta Profesion Undang-Undang 1976 merupakan sebuah badan awam yang diwujudkan untuk mengawal disiplin dalam profesion undang-undang. Aturan 53 k 2(4) membolehkan seseorang peguambela dan peguamcara yang terkilan untuk mendapatkan jalan keluar daripada mahkamah terhadap keputusan LT menubuhkan sesebuah TS (lihat perenggan 20).

(6) Daripada susunan kata-kata dalam A 53 k 3(1) dan (2), jelaslah bahawa permohonan untuk mendapatkan kebenaran hanya secara ex parte sahaja dan ini bermakna bahawa responden tidak ada hak untuk hadir. Prosedur yang betul bagi responden-responden ialah bahawa mereka perlu hadir hanya jika mahkamah telah memberi kebenaran ex parte kepada pemohon dan cabutan perintah pula telah dibuat dan disampaikan kepada mereka. Penyampaian perintah ex parte bersama-sama dengan kertas-kertas guaman kepada responden-responden itulah yang menjadikan para responden sebagai pihak-pihak kepada prosiding berkenaan (lihat perenggan-perenggan 25 dan 27).

(7) Seksyen 100 mentadbir kuasa responden kedua dalam membentuk sebuah TS manakala s 103 pula terpakai kepada peringkat akhir prosiding tatatertib setelah TS membuat dapatan kepada LT dan yang kemudiannya menubuhkan sebuah jawatankuasa tatatertib. Syarat untuk membolehkan

pihak yang terkilan itu merayu menurut s 103E hanya terbatas kepada keputusan yang diambil oleh LT di bawah s 103 dan bebas daripada s 100. Memakai pepatah *generalibus specilia derogant*, syarat untuk membuat rayuan di bawah s 103E itu tidak terpakai kepada remedi yang dipohon oleh pihak yang terkilan dengan sesuatu keputusan yang dibuat oleh LT di bawah s 100(1) dan oleh yang demikian memberi pihak yang terkilan itu hak untuk mendapatkan kajian semula kehakiman (lihat perenggan 36).]

Notes

For cases on application for judicial review, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 162–164.
For judicial review, see 9 *Halsbury's Laws of Malaysia* paras [160.059]–[160.061].

Cases referred to

Andrew v Institute of Chartered Accountants in England and Wales [1998] 1 All ER 14 (refd)
Automated Plastic Systems (M) Sdn Bhd v Menteri Sumber Manusia & Anor Kuala Lumpur High Court case No R2–25–25 of 2001 (refd)
British Steel pic v Customs of excise Commrs [1997] 2 All ER 366 (refd)
Corks v Thanet DC [1983] 2 AC 286 (refd)
Council of Civil Service Union v Minister for Civil Service [1985] AC 374 (refd)
Dr Amir Hussein bin Baharuddin v Universiti Sains Malaysia [1989] 3 MLJ 298 (refd)
Dr Chandra Muzaffar v Universiti Malaya [2000] 1 MLJ 173 (refd)
Goein v Board of Education of School District of Fremount, Dodge County 343, NW Zd 718, 723, 216, Neb 158 (refd)
Gouriet v Union of Post Office Workers [1978] AC 435 (refd)
Haji Laugan Tarki bin Mohd Noor v Mahkamah Anak Negeri Penampang [1988] 2 MLJ 85 (refd)
Lembaga Tatatertib Perkhidmatan Awam, Hospital Besar Pulau Pinang v Utra Badi a/l K Perumal [2000] 3 MLJ 281 (refd)
Lim Kit Siang v United Engineers (M) Bhd & Ors (No 2) [1988] 1 MLJ 50 (refd)
Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719 (refd)
Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 MLJ 1 (refd)
Mercury Communications Ltd v Director General of Communications [1996] 1 WLR 48 (refd)
Parrel v Alexander [1976] 2 All ER 721 (refd)
Roy v Kensington [1992] 1 AC 624 (refd)
South Johore Omnibus Sdn Bhd v Damai Ekspres [1983] 1 MLJ 101 (refd)
Sykt Telekom Malaysia Bhd v Business Chinese Directory Sdn Bhd [1994] 2 MLJ 420 (refd)
Trustees of the Dennis Rye Pension Fund v Sheffield City Council [1997] 4 All ER 747 (refd)

Legislation referred to

Federal Constitution art 5(1)
Legal Profession Act 1976 ss 93(3), (4), 94(3), 100(1), 103A, 103B, 103C, 103D, 103E(1), 103F, 103J, pt VII

Legal Profession (Disciplinary Board)(Procedure) Rules 1994 r 6
Rules of the High Court 1980 O 53 rr 2(2), (3), (4), 3(1), (2)

Kanawagi Superumaniam (Khana & Co) for the applicant.
N Nadkarni (Lambert Rasaratnam and SC Cheah with him) (Lee Hishammuddin) for the first, second, fourth, fifth and sixth respondents.
Nizam Zakaria for the Attorney-General's Chambers.

Faiza Tamby Chik J:

[1] This judgment raises a very important practice aspect of the participation and role of the Attorney General's Chambers and the respondents at the stage of the ex parte application for leave made pursuant to O 53 r 3(2) of the Rules of the High Court 1980 ('the RHC') for judicial review. As the number of judicial review applications are on the increase, I hope this judgment will serve as a suitable guide.

[2] In order to appreciate this case, I will first set out the background of this case. This case involves an advocate and solicitor and the Legal Profession Disciplinary Board ('DB'), the disciplinary authority for advocates and solicitors created under the Legal Profession Act 1976 ('the LPA'). This body is a public body created by Parliament to provide adjudicatory service, ie in deciding a complaint against an advocate and solicitor which is conducted by way of disciplinary proceedings. The applicant is an advocate and solicitor. The third respondent who was a former client of the applicant had lodged a complaint against the applicant to the DB. I will not go into the merits of this complaint yet at this stage except to state that this complaint does not involve any monetary issue. The second respondent had on an unspecified date constituted an investigating tribunal ('IT') pursuant to s 100 of the LPA against the applicant. The IT had notified the applicant of its intention to conduct a hearing which triggered the applicant to make this application for judicial review to quash the decision of the DB in constituting an IT against him. The applicant had named the Chairman of the DB as the first respondent, The Disciplinary Board as the second respondent, the complainant as the third respondent, the three members of the IT as the fourth, fifth and sixth respondents. As required by the RHC, the applicant had filed an ex parte summons in chambers dated 21 August 2002 for leave. The applicant had given notice of the ex parte application for leave and had lodged copies of the applicant's application to the Attorney General Chambers. The return date was 16 September 2002. On 16 September 2002 at the ex parte hearing, Senior Federal Counsel ('SFC'), Cik Nizam bte Zakaria appeared for the AG. She opposed the applicant's ex parte application for leave. I asked the learned SFC to submit written submission and the application was adjourned to 24September 2002. Subsequently, the learned SFC had submitted written submission. On 24 September 2002 when this case was called up, Mr Nadkarni of Messrs Lee Hishammuddin placed himself on record for the first, second, fourth, fifth and sixth respondents ('the respondents'). I accorded the respondent's counsel a hearing. The respondents' counsel also opposed the applicant's ex parte application for leave and which application I will refer to later. The matter was again adjourned. When this matter came up on

30January 2003, I indicated to the parties that as this proceeding namely the participation and role of the AG Chambers and counsel for the respondents at the ex parte application for leave stage for an application made for judicial review under O 53 of the RHC raises an important practice point, I would give a written judgment which would serve as a guide for future applications. The matter was adjourned to 27 March 2003. I now give my written judgment.

[3] As the law on the participation of the AG's Chambers and the respondents are distinct, I will take these two issues separately, starting with the AG's role. When an applicant files an application for leave for a judicial review remedy, he has to serve all the papers on the AG. The service on the AG's Chambers of the applicant's ex parte application is mandatory as per RHC, O 53 r 3(3) which states:

> The applicant must give notice of the application for leave not later than three days before the hearing date to the Attorney General's Chambers and must at the same time lodge in those Chambers copies of the statement and affidavit.

[4] There is a good reason why the applicant is required to serve the cause papers on the AG. The rule is based on the principle that judicial review is a principal tool of 'public law' applicable to 'public' bodies in claims brought before a specialized administrative court. In Malaysia, this administrative court is the High Court in its originating jurisdiction. As public bodies impliedly attract public interest and the guardian of public interest is the AG this provision makes the AG a nominal party in all judicial review applications. The intention of this rule was to ensure that the AG vets all judicial review applications in order to ascertain if his participation is warranted. Whether the AG elects to appear or not is solely at his discretion. And if the AG does elect to appear by himself or his representative then the court is bound to give a hearing and thereafter decide the matter. The court has no jurisdiction not to hear the AG. However if the AG appears it is for the AG to show the public element involved in the application and to either support or oppose the application. However, if there is no public element involved, there is no need for the AG to appear and it would be implied that the non-appearance of the AG would mean that the application did not touch issues of public interest. This takes me to the next question as what is the meaning of 'public interest' in order for the AG to intervene. I found one in a US case which defined 'public interest' as:

> ... Public interest.... is that interest shared by all citizens in general and by the community at large concerning pecuniary or legal liabilities.

[5] (See *Goein v Board of Education of School District of Fremount, Dodge County*, 343, NW Zd 718, 723, 216, Neb 158).

[6] The House of Lords in *Gouriet v Union of Post Office Workers* [1978] AC 435 at p 482 gave another version of the definition of the phrase public interest by stating:

> The decisions to be made as to public interest ... are of the type to attract political criticism and controversy ...

[7] The AG in electing to appear in a judicial review application must be cautious that his appearance is only in relation to matters of public interest.

This is important for there is a high degree of confusion that a public body exercising public function may take a decision which affects a person which invites private law. In such a situation the participation of the AG is not necessary as no element of public interest is involved. Not all decisions by public bodies involve public issues. Some decisions only involved private issues not touching public issues. Lord Diplock in *Council of Civil Service Union v Minister for Civil Service* [1985] AC 374 at p 408 made this point when he said:

> By altering rights or obligations of persons which are enforceable by or against private law.

[8] I think when a person's private right (in private law) is infringed by the public body and a judicial review application is commenced to remedy that wrong then this action only involves the aggrieved party and the public body as a respondent does not need for the AG's participation. In the instant case the applicant is complaining to the court that the second respondent in exercising its statutory powers by constituting an IT against him have infringed his rights therefore is asking this court to make good that wrong in quashing the decision of the second respondent. I am of the opinion that there is no question of public element arising in the applicant's complaint on the wrong allegedly done by the DB to the applicant and shared by all the citizens in general and by the community at large. The wrong complained of is purely a wrong done to the applicant in his personal capacity or in other words in his capacity which only attracts private law and not the public law so as to open the doors for the AG to intervene. The AG is not there to provide free counsel service either to the aggrieved party or to the public body decision maker in a judicial review application.

[9] As a further guideline, I would set out the various stages involved in a judicial review application and the function of the respective parties. The first stage that arises in a judicial review application is the ex parte stage. At this stage, the court only examines to see whether the applicant qualifies the threshold question of whether the said application is amenable to judicial review. The court is given the jurisdiction to decide this issue in the presence of the applicant only and the other parties, namely the AG and the respondents must have confidence in the court that the courts are capable of vetting this type of application to see if the application qualifies the initial test to go into the next stage of inter party action. It is a filtering stage that the application is not frivolous or vexatious or from busy bodies who have no locus standi in the application. As pointed out by the learned SFC in her written submission that I had not granted leave to the applicant in the unreported case of *Automated Plastic Systems (M) Sdn Bhd v Menteri Sumber Manusia & Anor* Kuala Lumpur High Court case No R2–25–25 of 2001. This shows that the court does not in every application grant leave as a right but only does so if the said application qualifies the initial test that the said application qualifies all the prerequisite qualification and therefore is amenable to judicial review. The role of the court at this stage of proceeding is well illuminated by the learned authors De Smith, Woolf & Jowell in their book *Principles of Judicial Review* (1999 Ed) at p 563 under the sub-heading 'the purpose of the permission (ie leave) stage', had written:

The purpose of the permission stage

The permission stage in Order 53 proceedings serves a number of purposes. First, it may safeguard public authorities by deterring or eliminating clearly ill-founded claims without the need for them to become a party to litigation. The requirement may also prevent administrative action being paralysed by a pending, but possibly spurious, legal challenge. Secondly for the High Court the permission procedure provides a mechanism for the efficient management of the growing judicial review caseload. A large portion of applications can be disposed of at the permission stage with the minimum use of the Court's limited resources. Thirdly, for the applicant the permission stage, far from being an impediment to access to justice, may actually be advantageous since it enables the litigant expeditiously and cheaply to obtain the views of a High Court judge on the merits of his application.

[10] If the courts are left alone to decide the issue of leave only in the presence of the applicant and without the respondent as provided by the Rules, the courts can carry out their function expeditiously and cheaply to the benefit of all concerned. Secondly, judicial review may be sought on the grounds that the public authority decision maker had adopted some procedural impropriety. The impropriety may consist of either a failure to follow a procedure expressly provided for by statute or some other rules or regulation having the force of law or of a breach of natural justice or any other ground including failure to satisfy a legitimate expectation. Again these are grounds that should be raised by the aggrieved party and answered by the public authority decision maker and which can only be done at the inter party stage. Again, this stage does not require the AG's presence. Thirdly, any issues touching the question of facts is an evidential matter, simple and pure between the litigant and the public authority decision maker and the AG should keep himself above this arena of litigation and should not feel free to venture into this arena. In other words, the role of the AG in an application for judicial review is a very limited one. One of the recognized areas is that of locus standi in that when the law places a matter in the hands of the AG, the AG can intervene to prevent a private citizen enforcing a public right through the process of judicial review (see *South Johore Omnibus Sdn Bhd v Damai Ekspres* [1983] 1 MLJ 101 and *Gouriet v Union of Post Office Workers* [1978] AC 435). The AG on being served with the ex parte application should vet the cause papers and decide if the said application arises public interest issue. If there is one the AG should come in, if there is none the AG should stay out.

[11] Having stated the above I will now proceed to examine the main trust of the SFC's submission to see if there is any merit in it. The main thrust of the SFC's submission is found in the written submission of the SFC at para 11. In brief, the SFC submits that there is no decision by the second respondent which can be amendable to a judicial review in order for an aggrieved party to apply to court for judicial review under O 53 of the RHC as required by law. Putting it in another way, the SFC submits that the action of the second respondent in constituting an IT against the applicant is not a decision which is amenable to a judicial review for the action of the second respondent tantamounts to only 'shift out any frivolous and wholly unmeritorious complaint. In short, it is very preliminary ... exercise ... given under s 100(1) — it simply forms an opinion that there is merit in the complaint lodged by the third

respondent for an IT to be constituted. No determination for setting up formal investigation on a complaint affecting the rights of the applicant arises at all at this stage.'

[12] By the above submission, the SFC is raising not a question of public interest but a question of threshold jurisdiction namely that the action of the second respondent in constituting an IT pursuant to powers given by s 100 of the LPA is not a quasi judicial decision of the second respondent that can be subject to judicial review process. As I have stated above, the objection raised by the SFC is what I have classified above as the first category and not an issue for the AG to participate. However, in order to answer the SFC's line of submission I will proceed on. To understand the learned SFC's argument, one has to first of all know the statutory constitution and statutory function of the DB and its various function. The legal constitution of the second respondent is found in s 93(3) of the LPA which reads:

> The Disciplinary Board shall consist of the following:
>
> (a) the Chairman of the Disciplinary Board appointed by the Chief Justice and such person shall be a Judge of the High Court or Supreme Court, a retired judge of the High Court or Supreme Court or any other person who is qualified to be a judge of the High Court or Supreme Court;
>
> Provided that in a case where a Judge or the Supreme Court is to be appointed as the chairman, such appointment shall be made by the Chief Justice in consultation with the Lord President;
>
> (b) the President of the Bar Council with the Vice-President as his alternate; and
>
> (c) fifteen practitioner members of not less than fifteen years standing appointed by the Chief Justice for a term of two years;
>
> Provided that the Chief Justice may extend their term for a period not exceeding a further two years or reappoint them.

[13] The quorum of the Disciplinary Board (DB) is set out in s 93(4) which reads:

> The quorum of the Disciplinary Board shall be seven members of which one member shall be from paragraph (a), one member from paragraph (b) and five members from paragraph (c) of subsection (3).

[14] The binding decision of the DB is set out in the Legal Profession (Disciplinary Board)(Procedure) Rules 1994 ('LP(DP)(P) Rules 1994'), r 6:

> Decisions of Disciplinary Board
>
> (1) Any decision of the Disciplinary Board shall be by a majority of the votes of the members present at the meeting.

[15] Reading the above three statutory provisions and particularly LP(DP(P) Rules 1994, r 6 which uses the word 'decision' it is beyond dispute that the action of the second respondent taken pursuant to s 93(3) of the LPA read together with s 93(4) is indeed a decision. The LP(DP)(P) Rules 1994 was made by the DB pursuant to powers given ss 103F and 103J. Section 103F states:

> Power to make rules
>
> (1) The Disciplinary Board shall, from time to time, make rules to regulate the procedure pertaining to disciplinary proceedings.

[16] Section 103J states: **A**

> Power to make rules
>
> The Disciplinary Board may, in consultation with the Bar Council and with approval of the Minister, make such rules as may be expedient or necessary for the better carrying out of the provisions of this part of this Act.

[17] Since LP(DP)(P) Rules 1994 itself by r 6 describes the action of the second respondent constituting an IT pursuant to s 100(1) of the LPA as a 'decision'. It is an adversity to logic to say that the action of the DB in setting up an IT undertaken by a qualified quorum of the DB is not a decision that can be amenable to judicial review and therefore leave should not be granted. This area of law as to which bodies are opened to judicial review is eloquently set out by the learned author of *Blackstone's Civil Procedure 2000* at p 762 para 74.1 under the title 'Bodies Open to Judicial Review' and which is applicable to us. Paragraph 74.1 reads: **B** **C**

> There are two conditions necessary to determine whether a decision by a body is judicially reviewable:
>
> (a) the decision or action must be made by a public body; and **D**
>
> (b) the public body must make a public law decision or take a public law action.
>
> Any body performing public law duties or powers is susceptible to judicial review. Historically, the most important factor considered by the courts in identifying activities subject to judicial review was the source of the power being exercised by the decision maker whose decision was sought to be challenged. However, the courts have recognised that such an approach is too restrictive and they are now influenced by the type of function performed by the decision maker (*R v Panel on Take-overs and Merger, ex parte Datafm* [1978] QB 815). **E**
>
> The essential elements which comprise a public law body are (1) a 'public element' (which can take many different forms); and (2) the exclusion of bodies whose sole source of power is consensual submission to their jurisdiction (per Sir John Donaldson MR in *R v Panel on Take-overs and Mergers, ex parte Datafm pic*). Thus, the test of what is a public body is not solely an examination of the sources of the regulator's power but also a consideration of the regulator's functions.' **F**

[18] There is no doubt that the action of the DB taken under the s 100(1) of the LPA is a decision which is susceptible to judicial review. The DB which has enacted the LP(DB)(P) Rules 1994 and which is a secondary legislature given under the powers of the LPA has in r 6 used the word 'decision' in the administrative law context and the law is when legislature uses the same words the presumption is that where draftsman uses the same word or phrases in the similar context the draftsman is presumed to have intended it in each place to bear the same meaning (see *Parrel v Alexander* [1976] 2 All ER 721 at p 736 (HL)). **G** **H**

[19] I think it is too late in the day for the SFC to say that the action of DB acting under s 100(1) of the LPA is not a decision in the administrative law context thus to exclude such a decision being amendable to judicial review. One last section I would like to refer to is O 53 r 2(4) of the RHC which gives locus standi to any aggrieved party and which reads: **I**

> Any person who is adversely affected by the decision of any public authority shall be entitled to make the application.

[20] From the wordings of this rule as long as a person is adversely affected by a decision of a public body then that person can move the courts. This section does not give an unaffected person a right to move the court which would put into operation the rule of locus standi very strictly. Since the applicant claims that he has been adversely affected by the decision of the DB in constituting an IT against him, the applicant qualifies to apply for judicial review. The DB created under the LPA pt VII is one such public body created to exercise discipline over the legal profession and is a public body. The action of the DB in constituting an IT against a member of the legal profession on a complaint lodged against the advocate and solicitor is one part of the proceedings which may result in the advocate and solicitor being struck off the rolls or suspended from practice (s 94(3) or pay a penalty of not more than RM5,000 (s 103(1) of the LPA) and of course this affects the advocate and solicitor. Order 53 r 2(4) thus enables an aggrieved advocate and solicitor to seek redress from the Court on the decision of the Legal Profession DB in setting an IT against an advocate and solicitor when there is an impropriety committed by the DB in its decision.

[21] The remedies available in administrative law is much wider than what it used to be in 1988 when *Lim Kit Siang v United Engineers (M) Bhd & Ors (No 2)* [1988] 1 MLJ 50 was decided by the Supreme Court. Today, declaration and damages are part of the judicial review process. (O 53 r 2(2) of the RHC and so is an order for injunction or monetary compensation (O 53 r 2(3) of the RHC). The learned writer MP Jain in his *Administrative Law of Malaysia and Singapore* (3rd Ed) p 665 under the heading of certiorari and prohibition had correctly stated the current law in the following words:

> Certiorari is the most commonly invoked writ in modern Administrative Law. It is the principal means of invoking judicial review over tribunals and quasi-judicial bodies which are now proliferating outside the regular judicial system. The present day judicial trend is to expand its scope. The parameters of certiorari are expanding in recognition of the need to impose judicial review over administrative bodies. Today, certiorari goes not only to a body discharging a quasi-judicial function, but to any body determining the rights of the people. The modem trend is that wherever there is power to determine questions affecting the rights of persons, there is a duty to act judicially and such a determination is subject to certiorari. Thus the Singapore High Court has ruled that certiorari can be issued to the Industrial Arbitration Court as it is a creature of statute and is quite clearly required to act fairly if not judicially in the determination of trade disputes. In Malaysia, certiorari has been frequently invoked to quash the discretionary decisions of Ministers and other administrative authorities. Certiorari has thus emerged into a general remedy for the control of decisions by the administration affecting rights of persons. Certiorari occupies a fundamental place in the entire scheme of judicial review of administrative action.

Similar is the case with prohibition. As Lord Denning observed in *R v Greater London Council & Anor* [1983] 1 AC 768:

> 'Just as the scope of certiorari has been extended to administrative authorities so also with prohibition. It is available to prohibit administrative authorities from exceeding their powers, or misusing them. In particular, it can prohibit a licensing authority from making rules or granting licences which permit conduct that is contrary to law.'

[22] It is well recognized that the second respondent, a body created by the LPA and empowered to carry out certain functions, is a public authority and exercise a quasi-judicial role. The decisions of the second respondent under s 100(1) affects the rights of an advocate and solicitor in his professional capacity and if there is any impropriety in the second respondent's decision the law grants the advocate and solicitor avenue to the courts by O 53 r 2(4) of the RHC. As any matters undertaken by the second respondent against the applicant affects the applicant in his professional capacity in that the applicant is a lawyer earning a livelihood as a lawyer, art 5(1) of the Federal Constitution is attracted for art 5(1) protects life and within which ambit of life is livelihood. The Court of Appeal in *Lembaga Tatatertib Perkhidmatan Awam, Hospital Besar Pulau Pinang v Utra Badi a/l K Perumal* [2000] 3 MLJ 281 at p 288 had given an extended meaning to the word life appearing in art 5 of the Federal Constitution to include not only to the mere existence of life but also incorporating all those aspects of life which goes to form the quality of life and which of course includes the right to livelihood namely employment and which is the subject matter of this instant case and reputation. Gopal Sri Ram JCA writing the decision of the court said (at p 294):

> Now, it cannot be gainsaid that any sort of punishment imposed upon a public servant has serious consequences. It carries with it a stigma. It tarnishes reputation. The authorities are now well settled that the punishment of dismissal deprives a person of his livelihood and therefore of his 'life' within the meaning of that expression in art 5(1) of the Federal Constitution. See *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145, *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261; *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan* [1996] 1 MLJ 481.
>
> Similarly, when a person is derived of his reputation, it would in my judgment, amount to a deprivation of 'life' within art 5(1) of the Federal Constitution. The right to reputation is part and parcel of human dignity. And it is the fundamental right of every person within the shores of Malaysia to live with common human dignity.

[23] I would rule that the action of the second respondent made pursuant to s 100(1) LPA 1976 in setting up an IT is a quasi judicial decision which can be amendable to judicial review and if that decision alters the right or obligation of the applicant and possible by the applicant against the DB in private law and for the further reason that such a decision by the DB affects the livelihood of an advocate and solicitor and which freedom of livelihood is protected by our Federal Constitution, art 5(1). It is reminded that all parties evoking disciplinary proceedings against a solicitor or as a matter of fact against any other professionals and setting forth disciplinary proceedings must treat such an action seriously for the very complaint against professionals involves the livelihood of those professionals, and which livelihood is protected by Federal Constitution, art 5(1), a right which the court seriously protects. I like to liken the commencement of a disciplinary proceeding against a professional is like walking onto a mine field — every step has to be watched for one wrong step the mine will explode under that professional and stop him there. On those grounds stated above, I hereby dismiss the SFC's submission and will proceed to rule on the respondent's submission.

[24] The respondents submitted that the applicant has adopted the wrong procedure in that the applicant should have appealed pursuant to s 103E(1)

of the LPA and further submits that the applicant does not have a arguable case in order for leave to be granted. The applicant replied by stating that the respondents have no right of appearance at this stage and that the applicant has shown serious issues that ought to go for an inter parte hearing. The applicant was not consenting to the appearance of the respondents at this stage. I would take all the issues together. It is undisputed that civil proceedings in the High Court is governed by the RHC which is a complete and comprehensive code in civil practice in Malaysia. The Rules Committee had deliberately set an O 53 hearing in two parts namely the initial ex parte stage and where the applicant succeeding at this ex parte stage then the matter proceed into the inter partes stage. Order 53 r 3(1) and (2) of the RHC states as follows:

(1) No application under this Order shall be made unless leave therefor has been granted in accordance with this rule;

(2) An application for leave must be made ex parte to a Judge in Chambers and must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits verifying the facts relied on.

[25] It is very clear from the wordings that this application is only ex parte which means that the respondent does not have a right of appearance. This line of argument is not before the court for the first time and I see that Azmel J had in the case of *Dr Chandra Muzaffar v Universiti Malaya* [2000] 1 MLJ 173 addressed this point. There, Azmel J said (at pp 176–177):

> At the outset I must point out that the application for leave by the applicant before me was an ex parte application. The status of the hearing of such application had not been changed even though I have invited the representative from the Attorney-General's Chambers and counsel for the respondent to appear and submit before me. The reason why I invited the representative from the Attorney-General's Chambers and the counsel for the respondent was to seek their view on a specific legal issue, ie whether this court can proceed to hear the applicant's application. Hence the appearance of the senior federal counsel and the respondent's counsel before me was at my invitation in the capacity as *amicus curie*. That being the status of the counsel for the respondent I am of the view that the respondent at this leave application stage does not have the right to lodge an appeal against my decision because the respondent is not made a party to the application yet. Only the applicant was a party to this ex parte application and only the applicant has the legal capacity to lodge an appeal if he is not satisfied with the decision. In the circumstances the appeal by the respondent should be summarily struck off for want of locus.
>
> It may be pertinent for me to also point out that I had stressed to all counsels that in their written submissions I would not be concerned with and would not be interested in the issue of merits of the application. The merits of the application would be fully argued at a later stage in the event to hear from the counsels at this stage would be confined to the issue of jurisdiction and nothing else. Such being my request I did not request the respondent and the Attorney General to file any affidavit in reply. The senior federal counsel in conformity to my request did submit on the issue of jurisdiction only. However counsel for the respondent and counsel for the applicant had exceeded the parameters of their submissions and went on to argue on merits of the application. I was not concerned with that and as such those parts of the arguments on merits were ignored completely.

[26] I agree with my brother Azmel J. Life will be simpler for all of us if the parties just follow the rules instead of making things difficult by adopting

rules which are not there. An illustration of this was seen in *Dr Amir Hussein bin Baharuddin v Universiti Sains Malaysia* [1989] 3 MLJ 298 where the judge allowed the respondents to be heard at the ex parte stage and thereafter gave a decision on it and which decision is at times quoted as authority when it should not be. In that case, the High Court expressly qualified himself by stating at p 299:

> In the present case, having regard to the importance and novelty of the issues raised, I had in the exercise of my discretion, heard not only the applicant but also the respondent in open court (see *R v IRC, ex p National Federation of Self-employed and Small Businesses* at p 642F per Lord Diplock). It is true that by the agreement, that oral ex parte hearing may be waived and the first application treated as the application for judicial review itself thus resulting in a saving of time and costs (see eg *R v Secretary of State for the Environment, ex p London Borough Brent Council* at p 642). But there was neither such agreement nor an order to treat the application for leave as the application for judicial review.
>
> Be that as it may, whether the applicant alone or both parties, are heard, in an application for leave, the threshold old test is the same: Does the applicant for leave, the threshold old test is the same: Does the applicant have an arguable case for review, a sufficient interest and has there been undue delay? I had, in the course of the hearing, to remind counsel more than once, to keep the first of these points in the forefront of their minds because of the somewhat emotive arguments addressed to me as though the application were at a full hearing after leave granted.

[27] One can see from reading the above judgment that Edgar Joseph Jr J (as he then was) adopted that procedure to do justice to that case to save time and costs by permitting the ex parte application to be heard inter party but confining only to the threshold question. But this instant case has proven to be otherwise in that this application has been delayed from 16 September 2002 to 27 March 2003 by the appearance of the respondents' counsel. Under normal circumstances, I would have disposed the ex parte stage at one hearing namely on 16 September 2002 and most probably disposed the whole case by the end of 2002 but for the appearance of the respondents at this stage. The rules have expressly made the initial stage of judicial review to be ex parte and if the court is left alone to decide on the threshold jurisdictional point whether the applicant has an arguable case much time, labour and costs would be saved for all parties and the court. If legislature had intended that the respondents be given an opportunity at this stage then the Rules would have so stated but nevertheless, the Rules expressly states this application to be ex parte with a definite intention to save time and costs which normally follows contested inter party application. This rule is not a dead letter and is there for compliance by parties. Counsels should have confidence that when a judge hears an ex parte application, the judge is competent to decide whether that application should proceed to the inter parte stage or that application be brought to an end at the ex parte stage. For the respondents' counsel to appear at the ex parte stage is to unnecessarily burden this judicial proceedings which otherwise would be decided very swiftly. The proper procedure for the respondents would be for them to appear only when the court has granted ex parte leave to the applicant and that order has been extracted and served on them. It is the service of the ex parte order together with the cause papers on the respondents that makes the respondents parties

to this proceeding. There is also a possibility that the applicant may change his mind not to proceed with the action after leave has been granted. When the application is served on the respondent, the respondent has the opportunity to oppose the application. It is not that an order is going to be made without giving the respondents an opportunity to be heard. So why rush into 'battle' and incur cost. It is good lawyering for a lawyer to always keep his client's cost to the minimum. This case is not ready for the respondents until the court grants leave and the order is served on the respondents together with the cause papers. For the respondent to make a search at the court file room and get copies from there, as they have admitted here, and appeared at the ex parte stage may tantamount to abuse of court process. The Supreme Court in *Sykt Telekom Malaysia Bhd v Business Chinese Directory Sdn Bhd* [1994] 2 MLJ 420 had aptly described that 'failure to comply them will lead to chaos in the conduct of litigation'.

[28] Though I ruled that the respondents have no right of appearance at an ex parte stage, I will go into the respondents' submission because the respondents have already submitted on this and I examine their submission. The respondents' first submission is that the proper remedy for the applicant is not to seek judicial review of certiorari but to have appealed under s 103E(1). I would like to state that the path to justice is not built on a single railway track type path but the route to justice is a flexible one and the convenient one is chosen by the aggrieved party. Putting this philosophy in law practice, it means that the availability of one route to a litigant will not shut him out from an existing alternative route. What is important to a litigant is that when he comes to court for justice the court will ensure justice is done irrespective of any irregularities in the proceedings. This law on availability of the alternative remedy to a litigant in administrative law was highlighted by the Federal Court in the case of *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1. In approving the Court of Appeal decision in *Sykt Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan Bhd v Majlis Perbandaran Pulau Pinang* [1996] 2 MLJ 697 where the Court of Appeal said (at p 730):

> The availability of an alternative domestic remedy will not shut out an application for judicial review where the complaint made to the court is one of 'error of law' or 'abuse of power' going to the legality of the conduct of the inferior tribunal or other decision-making authority, unless the alternative domestic remedy was intended for and in fact constitutes a wholly adequate machinery for the just disposal of the complaint in question.

[29] Briefly, the Federal Court at p 37 approached this issue by asking the question:

> Did the existence of the statutory remedy of appeal and its non-exercise, in this case, exclude Judicial Review?

[30] and at p 41 after giving its reasons the Federal Court answered:

> We would answer this question in favour of the Society, that is to say, the Society's Application was not barred by the non-exercise of the Internal Appeal Procedure.

[31] The highly respected Hashim Yeop Sani SCJ (then, later CJ Malaya) in *Haji Laugan Tarki bin Mohd Noor v Mahkamah Anak Negeri Penampang* [1988] 2 MLJ 85 had reflected this law as early as 1988 when he said (at p 87):

> ... it is not an inflexible rule that where there is an appeal provision however elaborate in the relevant statue ... leave for an order of certiorari should be automatically be refused.

[32] There are various judgments of the Supreme Court and Federal Court that support the above proposition. In the instant case before me what is under attack is the action of the second respondent in constituting an IT against the applicant which is governed by s 100(1) whereas the section relied upon by the respondent to insist that the Applicant should have appealed is s 103E(1). Section 100(1) reads as follows:

> Investigating Tribunal
>
> (1) Where a written application or complaint is referred to the Disciplinary Board, the Disciplinary Board shall, (if it considers that there is merit in the application or complaint), forthwith constitute an Investigating Tribunal.

[33] Section 103E(1) reads as follows:

> Appeal from the decision of the Disciplinary Board
>
> (1) Any party aggrieved by any decision or order made by a Disciplinary Board shall have the right to appeal to the High Court within one month of notification of the decision or order complained against.

[34] From the above one can see that whereas the decision of the second respondent that is the subject matter of this application emanates from the action of the second respondent acting under s 100(1), the section relied upon by the respondent to support this line of submission is s 103E(1) in relation to ss 103A, 103B, 103C, 103D. From the above, one can see that the consequences from the operation of ss 100 and 103A–D are two distinct. Whereas ss 103A–102E are specific sections, s 100 is separate and therefore to be interpreted differently in accordance to the maxim *generalibus specialia derogant*. The definition of this maxim was illucidated by the Court of Appeal in the judgment of Gopal Sri Ram in the case of *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719 at pp 757–758 where he said:

> ... it lies in the rule of construction expressed in the maxim generalibus specialia derogant. Where there are two provisions of written law, one general and the other specific, then, whether or not these two provisions are to be found in the same or different statutes, the special or specific provision excludes the operation of the general provision.
>
> Thus in *Commissioner of Income Tax v Shahzada Nand & Sons* AIR 1966 SC 1342, where (at p 1347) Subba Rao Ja said:
>
> 'Another rule of construction which is relevant to the present enquiry is expressed in the maxim *generalia specialibus non derogant*, which means that when there is a conflict between a general and a special provision, the latter shall prevail. The said principle has been stated in *Craies on Statute Law* (5th Ed) at p 205, thus:
>
> "The rule is, that whenever there is a particular enactment and a general enactment in the same statute and the latter, taken in its most comprehensive sense, would

A overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply.'"

See also *PP v Chew Siew Luan* [1982] 2 MLJ 119:

'In the present case, s 323(1) is a general provision while s 213(3) is a special provision
B that exclusively deals with the mode afforded for the protection of exempted tenancies and with the consequences of endorsement ...'

[35] Yet there is authority to state that judicial review is simply an inappropriate remedy to quash a public decision maker. Lord Bridge in *Corks v Thanet DC* [1983] 2 AC 286 at p 295B–C said:

C Even though nullification of a public law decision can, if necessary, be achieved by declaration as an alternative to an order of certiorari, certiorari to quash remains the primary and most appropriate remedy. Not that all public law remedies are available to be sought by the unified and simplified procedure of an application for judicial review, there can be no valid reason, where the quashing of a decision is the sole remedy sought, why it should be sought otherwise than by certiorari.

D **[36]** Now coming back to our case, it can be seen that s 100 governs the power of the second respondent in constituting an IT whereas s 103 applies to the end stage of the disciplinary proceeding when the IT had made its finding to the disciplinary board and which then sets up a disciplinary committee. The requirement for the aggrieved party to appeal pursuant to s 103E is only confined to the decisions taken by the DB under s 103 and is
E independent from s 100. Therefore applying the maxim *generalibus specialia derogant*, the requirement to appeal under s 103E does not apply to the remedy sought by a party aggrieved by a decision the DB made under s 100(1) and therefore giving the aggrieved party a right to seek judicial review. I am of the view that the present trend of judicial thinking is for the case to be heard
F rather than be struck out. In the House of Lords case of *Roy v Kensington* [1992] 1 AC 624 where Lord Lowry who gave the main judgment said:

The arguments for excluding the present case from the ambit of the rule or, in the alternative, making an exception of it are similar and to my mind convincing. Dr Roy has either a contractual or statutory private law right to his remuneration in accordance with his statutory terms of service. Although he seeks to enforce
G performance of a public law duty under para 12(1), this private law rights dominate the proceedings ... unless the procedure adopted by the moving party is ill-suited to dispose of the question at issue, there is much to be said in favour of the proposition that a court having jurisdiction ought to let a case be heard rather than entertain a debate concerning the form of the proceedings.

[37] This ratio was later applied in *Mercury Communications Ltd v Director*
H *General of Communications* [1996] 1 WLR 48, *British Steel pic v Customs of excise Commrs* [1997] 2 All ER 366, *Trustees of the Dennis Rye Pension Fund v Sheffield City Council* [1997] 4 All ER 747, *Andrew v Institute of Chartered Accountants in England and Wales* [1998] 1 All ER 14. Gone are the days when the court will look at the form and dismiss a case and sent an aggrieved party empty handed from the court. The current tendency is that the court looks
I at the substance of the case and do justice accordingly without denying the aggrieved party justice due to some formal or procedural failure. Sir John Donaldson MR in *East Berkshire Health Authority v Walsh* [1985] QB 152

at p 166 described O 53 as an anti-technicality rule or in other words in an O 53 application there is no room for technical objections. Order 53 cuts through technicalities and dispenses justice in a direct manner. Yet there is one practical aspect of it whereas a judicial review is heard by a single judge of the High Court, an appeal under s 103E is to be heard by three judges (see s 103E(2)). It is very much expeditious to have a case heard before a single judge than have one heard before three judges and justice calls for the expeditious disposal of a case which means that this court is more appropriate than the appeal procedure before three judges. Whereas the practice in my court is that an application for judicial review can be disposed off within 30–60 days, I believe that an appeal to three judges is not an easy matter to start off in the first place for to get three High Court judges to sit together at the tune when the courts are overloaded with cases. Under the present conditions, it will be more appropriate and expeditious in the course of justice for a dispute emanating under s 100 to be resolved by way of judicial review application. Accordingly, I rule that it is not fatal for the applicant to apply for judicial review on a matter arising from s 100 of the LPA. As for the respondents' second ground that the applicant has not made out an arguable case, I am unable to accept this line of submission. That submission is immature at this stage particularly when I do not have the benefit of the respondents' affidavit challenging or rebutting the applicant's case. I have gone through the applicant's affidavit and find that the applicant has made out a serious case for which leave ought to be granted and I hereby grant the applicant leave as well as a stay on the DB's further proceeding. I therefore grant order in terms for encl (8), prayers 1 and 2.

[38] On the question of cost, an ex parte application for judicial review is a proceeding for which the court has a discretion to award costs. Under normal circumstances in an ex parte application, the question of costs does not arise. However, this situation is different. The respondents invited themselves and I gave them a hearing. The applicant had to face and respond to the respondents thus incurring costs. The respondents' appearance at this stage has resulted in unnecessary costs and time to the applicant. I therefore order the respondents to pay the applicant's cost of this ex parte stage in any event and to be taxed and paid forthwith.

Application allowed with costs against the first, second, fourth, fifth and sixth respondents.

Reported by Eugene Jayaraj